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# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

DANIEL ANDREW SEEGER

---

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit reversing respondent's conviction for refusal to submit to induction into the armed forces.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 11–28, *infra*), is reported at 326 F. 2d 846. The opinion of the district court (App. B, pp. 29–41, *infra*) is reported at 216 F. Supp. 516.

## JURISDICTION

The judgment of the court of appeals was entered on January 20, 1964, (App. C, p. 43, *infra*). On February 19, 1964, Mr. Justice Harlan extended the

time to petition for certiorari to March 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in granting an exemption from military service to those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form," Congress could constitutionally limit such exemption to individuals who have a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation * * *."

## STATUTE INVOLVED

Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), provides in pertinent part:

> Nothing contained in this title [sections 451, 453, 454, 455, 456 and 458–471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *

STATEMENT

Respondent was convicted after a trial by the court in the Southern District of New York, of having violated 50 U.S.C. App. 462 by refusing to submit for induction into the armed forces. He was sentenced to imprisonment for a year and a day. On appeal, the conviction was reversed.

Except for one stipulation of fact, the evidence consisted of respondent's Selective Service file. It shows that respondent first registered with his local board on reaching his eighteenth birthday in September 1953, and that he then requested deferment as a student but made no claim for exemption as a conscientious objector (R. 9a; GX 3, p. 7).[1] He was initially classified 1–A but was thereafter given a student deferment which was twice renewed. Respondent first claimed conscientious objector status on July 15, 1957, in a letter to his local board, and his classification was then changed to 1–A (GX 3, p. 8).

In his letter respondent wrote that his claim arose "from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain." It was his conclusion "that war, from the practical standpoint, is futile and self-defeating, and that from the more important moral standpoint, it is unethical" (GX 11).

[1] "R." refers to respondent's appendix in the court of appeals; "GX" indicates Government exhibit.

Respondent was then sent a special Selective Service questionnaire for conscientious objectors. In his answers to the presently material questions respondent (1) refused to answer categorically whether or not he believed in a Supreme Being but expressed respect for "belief in and devotion to goodness and virtue for their own sakes"; (2) expressed his opposition to military mobilization and its effect on human values; (3) concluded that "I cannot participate in actions which betray the cause of freedom and humanity. Experience with the past indicates that our armament policy will lead to war, and war, with its indiscriminate crushing of human personality, cannot preserve moral values. We cannot preserve freedom by denying freedom; the end does not justify the means"; (4) stated that his views were derived from a variety of works he had read, including books by Mohandas Gandhi and Bertrand Russell and studies of the works of Leo Tolstoy; and (5) said that he relied "on no particular person for religious guidance" but resolved "spiritual and ethical problems by reading relevant essays or books, by discussion and debate with colleagues, and ultimately, by following the dictates of my conscience" (GX 13). His views were elaborated somewhat further in a second questionnaire which was answered in November 1958 (GX 24). Respondent stated therein that he was opposed to the use of force, but only under certain circumstances. He said that he "would *restrain* the attacker and the thief * * * [but] would not try to stop them * * * if doing so meant killing or injuring other innocent people." (Emphasis in the original.)

In his appearance before a hearing officer of the Department of Justice, respondent indicated that he was not affiliated with any of the sects to which conscientious objectors characteristically belong. He expressed "strong sympathetic support" for the Quaker movement and sympathy for some of the views of the Jehovah's Witnesses, but stated that the matter is a personal problem requiring each individual to "make up his own mind as to how he feels toward his fellow man" (R. 10a).

Respondent's appeals were rejected, and his 1–A classification was sustained by the local appeal board and by the National Selective Service Appeal Board (Resume of Exhibits, pp. 5, 7). Respondent was thereupon ordered to report for induction, and he refused to comply.

It was stipulated in the district court that respondent's witnesses, if called, would have testified that his views were "religious" within the definition of that word given in *United States* v. *Kauten,* 133 F. 2d 703, 708, and subsequent decisions in the Second Circuit following *Kauten.*[2] The district court concluded that the *Kauten* definition had been rejected by Congress in 1948—when it enacted the present statutory language—in favor of a limited exemption granted only to "those who based their objections on belief in

[2] In *Kauten* the statutory exemption was considered to apply only to "a conscientious objection to participation in any war under any circumstances * * * a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." 133 F. 2d at 708.

a deity commanding abstinence from war on pain of supernatural sanction" (p. 37, *infra*). This exemption was held to violate neither the First Amendment nor Article VI, Clause 3 of the Constitution.

The court of appeals reversed, holding that the "Supreme Being requirement" of the statute "create[d] an impermissible classification" (p. 27, *infra*) insofar as it distinguished "between internally derived and externally compelled beliefs" (p. 25, *infra*). The court held, in substance, that any exemption of the sort provided by the statute would constitutionally have to "embrace all those faiths which can validly claim to be called 'religions'" (p. 24, *infra*), and suggested that the constitutionally required definition of "religion" is the one given in *United States* v. *Kauten, supra,* (pp. 19, 25, *infra*).

## REASONS FOR GRANTING THE WRIT

The decision of the court of appeals expressly holds unconstitutional a classification deliberately adopted by Congress in 1948 and implicitly approved in subsequent extensions and modifications of the Universal Military Training and Service Act. That holding conflicts with decisions of the Ninth and Third Circuits in which the same classification was sustained against similar constitutional challenges. The decision also raises important questions concerning the permissible scope of Congress' authority to require compulsory military service. It is, therefore, an appropriate case for review and authoritative determination by this Court.

1. Before 1948 the conscientious objector provision of the Selective Service Act provided for exemption of anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 54 Stat. 889. While the Court of Appeals for the Second Circuit intepreted this language broadly in *Kauten* and subsequent cases,[3] the Ninth Circuit, in *Berman* v. *United States*, 156 F. 2d 377, 380, certiorari denied, 329 U.S. 795, rejected the *Kauten* formula and held that the phrase "by reason of religious training and belief" had been "written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one." Consequently, the Ninth Circuit in *Berman* adopted, for purposes of interpreting the conscientious objector provision, the definition of religion stated by Mr. Chief Justice Hughes in dissent (with Justices Holmes, Brandeis and Stone concurring) in *United States* v. *Macintosh*, 283 U.S. 605, 633–634: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." See 156 F. 2d at 381. It was the *Berman* definition that Congress selected in 1948 and incorporated into the statute, thereby rejecting the broader definition announced in *Kauten*. Indeed, the legis-

[3] *United States ex rel. Phillips* v. *Downer*, 135 F. 2d 521 (C.A. 2); *United States ex rel. Reel* v. *Badt*, 141 F. 2d 845 (C.A. 2). The *Kauten* definition appears in note 2, *supra*.

lative history discloses in no uncertain terms that this was a knowing choice by Congress. For, after noting that the present language "reenacts substantially the same provisions" as were found in the earlier statute, the Senate Report cites the *Berman* case as support for the statement that "[e]xemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service." S. Rep. No. 1268, 80th Cong., 2d Sess. (1948), p. 14.

2. The constitutionality of the statutory definition has been explicitly upheld in the Ninth Circuit, *Etcheverry* v. *United States,* 320 F. 2d 873, 874, certiorari denied, 375 U.S. 930; *Clark* v. *United States,* 236 F. 2d 13, 24, certiorari denied, 352 U.S. 882; *George* v. *United States,* 196 F. 2d 445, 450–452, certiorari denied, 344 U.S. 843, and assumed in that circuit in *United States* v. *Peter,* 324 F. 2d 173, petition for certiorari pending, No. 787 this Term. It has also been sustained in the Third Circuit, *United States* v. *De Lime,* 223 F. 2d 96, 100. This conflict must be resolved by this Court so that the Act may be fairly and uniformly administered throughout the country.

3. Like *United States* v. *Jakobson,* 325 F. 2d 409, another decision of the Second Circuit from which we are also petitioning for a writ of certiorari, and *Peter* v. *United States,* No. 787, this Term, pending on the registrant's petition, this raises serious questions concerning the permissible scope of Congress' power to deal with persons otherwise eligible for induction under

the Act who assert conscientious objections to service in the military forces in combatant or noncombatant capacities. By limiting this exemption to those who claim it because of "religious training and belief" and by specifically defining these terms, Congress has purposefully excluded from the exempt category not only those who do not believe in a relation to a Supreme Being or whose relation to a Supreme Being does not involve duties, but also those whose views are "essentially political, sociological, or philosophical" or are based on "a merely personal moral code." The present decision, we submit, sustained the conscientious objector claim of a registrant whose beliefs were based merely on his rational decision that war is undesirable. Hence it cast serious doubts on Congress' power to deny the exemption to those whose sincere views are "essentially political, sociological, or philosophical" notwithstanding the fact that such persons would not appear to be protected by the "Religion Clause" of the First Amendment.

## CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
*Solicitor General.*
HERBERT J. MILLER, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
*Attorneys.*

MARCH 1964

## APPENDIX A

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 206—September Term, 1963

(Argued November 15, 1963, Decided January 20, 1964.)

Docket No. 28346

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UNITED STATES OF AMERICA, APPELLEE,

*v.*

DANIEL ANDREW SEEGER, DEFENDANT-APPELLANT.

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Before:

LUMBARD, *Chief Judge,* and
KAUFMAN and HAYS, *Circuit Judges.*

---

KAUFMAN, *Circuit Judge:*

On this appeal, Daniel Andrew Seeger contends that he was improperly denied an exemption from military service because his conscientious objections were not dependent upon "a belief in a relation to a Supreme Being" as required by § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. § 456(j). Seeger was convicted of violating 50 U.S.C. App. § 462, because of his refusal to submit to induction,

as ordered by his local Selective Service Board. At his trial before Judge Levet without a jury, he stipulated that he received an induction notice and that he refused to comply with its terms.

The statute in question, as revised in 1948, provides that the Selective Service Act shall not "be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." 50 U.S.C. App. § 456(j). In filling out the form for those who claim conscientious objector status, Seeger found himself unable to assert categorically that he believed in a Supreme Being.

Although the government has conceded that Seeger's abhorrence of war is both sincere and predicated on "religious training and belief," as the phrase has been defined by this Court prior to the addition of the "Supreme Being" clause to the statute, *United States* v. *Kauten*, 133 F. 2d 703 (2d Cir. 1943), appellant's draft board denied the exemption on the basis of its finding that Seeger's views were not grounded upon "a belief in a relation to a Supreme Being." Seeger asserts that the "Supreme Being" requirement, as applied to him, constitutes a law respecting an establishment of religion, within the meaning of the First Amendment, and an arbitrary classification, violative of the due process clause of the Fifth Amendment.

## I.

As required by law, Seeger registered with his local draft board upon attaining his eighteenth birthday in September of 1953. Apparently, his pacifist sympathies had not yet become fully developed, for in filling out his classification questionnaire, he ignored the claim for conscientious objector exemption, and simply indicated that he believed himself entitled to a student deferent. Initially classified 1-A, Seeger subsequently received the 2-S deferment and remained in that classification until August, 1958, when he was once again reclassified as 1-A.

On July 12, 1957, Seeger wrote to his local board, and for the first time revealed the conscientious objections to military service which were to lead to his refusal to submit to induction, and ultimately, to his conviction. In this letter, and in the forms and statements which soon followed, he sought to put into words the deeply-rooted beliefs and sentiments which formed the basis of his claim for an exemption.

The initial letter was itself not lengthy. "As a result of the resolution of a number of problems of conscience with which I have been preoccupied for the past months," Seeger wrote, "I am bound to declare myself unwilling to participate in any violent military conflict, or in activities made in preparation for such an undertaking. My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from the more important moral standpoint, it is unethical."

The nature and foundation of Seeger's objections were further illuminated in his response to the special form for conscientious objectors, prepared by the Selective Service System and forwarded to appellant by his local board. Although executing the claim for exemption from both combatant and non-combatant training and service, he significantly altered the wording of the printed form. Had he adopted the printed statement verbatim, Seeger would have declared that he was, "by reason of my religious training and belief, conscientiously opposed to participation in war in any form * * *" Seeger was willing to endorse this oath as his own, but only after placing quotation marks around the word "religious," and deleting the words "training and."

His reply to the first question on the form, which inquired into his belief in a Supreme Being, was ultimately to prove fatal to Seeger's claim. Refusing to assert a simple belief or disbelief in a deity, Seeger felt compelled to express his convictions in more extensive terms. In a statement attached to the questionnaire, he explained his feeling that "the existence of God cannot be proven or disproven, and the essence of His nature cannot be determined. I prefer to admit this, and leave the question open rather than answer 'yes' or 'no.'" Seeger was anxious to explain, however, that "skepticism or disbelief in the existence of God does not necessarily mean lack of faith in anything whatsoever * * * Such personages as Plato, Aristotle and Spinoza evolved comprehensive ethical systems of intellectual and moral integrity without belief in God, except in the remotest sense." Finally, rejecting dependence upon his Creator for a guide to morality, Seeger asserted "more respect for * * * belief in and devotion to goodness and virtue

for their own sakes, and a religious faith in a purely ethical creed."

With obvious sincerity, Seeger articulately attempted further to expound the ethical position to which he felt driven by his conscience. "It is our moral responsibility," he wrote, "to search for a way to maintain the recognition of the dignity and worth of the individual, the faith in reason, freedom, and individuality, and the opportunity to improve life for which democracy stands." In language which underscored the ethical foundation of his faith, he decried "the tremendous spiritual price that man pays for his willingness to resort to the mass destruction of human life to perpetrate his 'ideals.'" "I cannot," Seeger insisted, "participate in actions which betray the cause of freedom and humanity. Experience with the past indicates that our armament policy will lead to war, and war, with its indiscriminate crushing of human personality, cannot preserve moral values * * * To resort to immoral means is not to preserve or vindicate moral values, but only to become collaborators in destroying all moral life among men."

Unmoved by his appeal, the selective service board voted to retain Seeger's 1-A classification, and ordered him to report for a pre-induction physical examination. When a personal appearance before the board failed to produce a different result, Seeger sought review by an Appeal Board which, in routine fashion, forwarded his file to the Department of Justice for an advisory opinion. The Department, in turn, requested the Federal Bureau of Investigation, as it does in all such cases, to investigate the accuracy and sincerity of Seeger's claims. And, as a result of this investigation, a highly favorable portrait of the appellant began to develop.

Seeger, it was revealed, was the son of an "exceptionally religious" Roman Catholic family, and two of his uncles had become priests. An honor student in high school, Seeger's academic record in college was outstanding, and he had been selected as editor-in-chief of his college newspaper. Friends, teachers and employers interviewed by the Bureau spoke highly of his personal qualities, with particular emphasis being placed on Seeger's unquestioned integrity and sincerity. It was noted, finally, that Seeger had no record whatsoever of legal or economic difficulties.

A résumé of this investigation was forwarded to a Hearing Officer of the Department of Justice, and a hearing was conducted in which two witnesses joined Seeger to appear in his behalf. As summarized in the report of the Justice Department, introduced into evidence below, the Hearing Officer reported that Seeger "impressed him as a truthful, decent young citizen who conscientiously objects to joining in any manner any activity which would bear on military affairs." Emphasizing Seeger's "extreme intelligence and lucidity," the Officer concluded "that the registrant is completely sincere in making his claim and that the character of registrant's beliefs, as adduced at the hearing and from the various documents on file, are honest." As further summarized by the Justice Department, the Officer added that Seeger "is opposed to participation in war in any form; that his conscientious objections are based upon his individual training and belief, both of which include research in religious and cultural fields; [and] that the registrant is sincere in his claim which is made in good faith." The Hearing Officer concluded by recommending that "the appeal of the registrant

based upon grounds of conscientious objection be sustained."

Despite this recommendation and the results of the FBI investigation, the Justice Department advised against allowing Seeger an exemption. It is immediately apparent from a reading of the Department's report that its decision rested entirely on the finding that Seeger's objections, however sincere, were not based upon "a belief in a relation to a Supreme Being," as required by § 6(j) of the Act. Presumably for the same reason, the Appeal Board voted unanimously to retain Seeger's 1-A classification. The Presidential Appeal Board affirmed, and Seeger was ordered to report for induction. Reporting as directed, and having been found acceptable for military service, Seeger refused to submit to induction and the present prosecution and conviction ensued.[1]

## II.

The legislative background which underlies our present draft laws and their exemption for conscientious objectors has been thoroughly and recently explored by this court in *United States* v. *Jakobson,* 325 F. 2d 409 (2d Cir. 1963). See also Conklin, Conscientious Objector Provisions: A View in the Light of *Torcaso* v. *Watkins,* 51 Geo. L. J. 252 (1963). It would be in order, however, to review that background in brief résumé. The Draft Act of 1917, 40

[1] Reporting, having been found acceptable, and taking all required steps short of the final submission to induction, Seeger is able here to challenge constitutional infirmities in the "jurisdiction" of the Board which denied him the exemption. *Estep* v. *United States,* 327 U.S. 114 (1946). Compare *Falbo* v. *United States,* 320 U.S. 549 (1944).

Stat. 78, afforded a statutory exemption only to those objectors affiliated with a "well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form * * *" During the height of World War I, the constitutionality of this narrow provision was tersely upheld against First Amendment challenges, despite its limitation to specific, organized historic pacifist churches. *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918). But see Kurland, Religion and the Law 37-38 (1962).

The conscientious objector provisions of the 1940 selective service act were more broadly drafted. In this statute, in effect throughout the Second World War, an exemption from combatant training was afforded to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 54 Stat. 889. Called upon to illuminate the congressional reference to "religion," Augustus Hand, writing for this court in *United States* v. *Kauten*, 133 F. 2d 703 (2d Cir. 1943) offered this often-cited definition: "Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets * * * Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: 'Conscience is a God to all mortals'; impelled Socrates to obey the voice of his 'Daimon' and led

Wordsworth to characterize 'Duty' as the 'Stern Daughter of the Voice of God.'"

"There is a distinction," the Court continued, "between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." 133 F. 2d at 708.

Yet, while this expanded concept of religious belief was adopted in this circuit, *United States ex rel. Phillips* v. *Downer*, 135 F. 2d 521 (2d Cir. 1943); *United States ex rel. Reel* v. *Badt*, 141 F. 2d 845 (2d Cir. 1944), and was recognized as a constitutionally required definition of religion, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 658 (1943) (dissenting opinion of Frankfurter, *J.*), it was rejected in favor of a narrower standard by the Court of Appeals for the Ninth Circuit in *Berman* v. *United States*, 156 F. 2d 377, cert. denied, 329 U.S. 795 (1946). Over the vigorous dissent of Judge Denman, the *Berman* court held that a belief which was not dependent upon faith in a Deity or superhuman power was in no sense religious, as Congress used the term. In revising the conscientious objector provision for the Selective Service Act of 1948, Congress expressly approved the *Berman* definition, and specifically required a "belief in relation to a Supreme Being" as a pre-requisite for exemption.

## III.

The exemption, as revised in 1948 by the addition of the "Supreme Being" definition of religion, has been upheld against constitutional challenges by the courts of this and other circuits on several occasions since its enactment. *United States* v. *Bendik*, 220 F. 2d 249 (2d Cir. 1955);[2] *Clark* v. *United States*, 236 F. 2d 13 (9th Cir. 1956), cert. denied, 352 U.S. 882 (1956); *George* v. *United States*, 196 F. 2d 445 (9th Cir. 1952), cert. denied, 344 U.S. 843. Most recently, the Court of Appeals for the Ninth Circuit, in a brief, three-paragraph opinion, refused to reconsider its holdings in the *Clark* and *George* cases, and adhered to its position that the Supreme Being requirement was a permissible legislative classification. *Etcheverry* v. *United States*, 320 F. 2d 873 (9th Cir. 1963), cert. denied, 84 S. Ct. 331 (1963). Like the trial judge below, *Bendik*, *Clark* and *George* held that the exemption for conscientious objectors was an act of legislative grace, and could hence be granted upon any condition which Congress desired to impose. We find it unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress. See *Selective Draft Law Cases*,

[2] In no real sense may our decision today be said to "overrule" *Bendik*. From a reading of the *Bendik* opinion, it is clear that the court did not consider the argument that the Supreme Being requirement distinguished *among* religious beliefs, the question we decide today. *Bendik*, rather, was concerned with the permissibility of a distinction between religious and nonreligious objectors. For this reason, as well as the fact that the grounds upon which *Bendik* relied was placed in serious question by *Speiser* v. *Randall*, *infra*, *Bendik* neither conflicts with nor can be dispositive of the present appeal.

245 U.S. 366 (1918); *Hamilton* v. *Regents*, 293 U.S. 245 (1934). Compare *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 250–53 (1963) (concurring opinion of Brennan, J.). For it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See *Speiser* v. *Randall*, 357 U.S. 513 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination. We are thus compelled to determine the constitutionality of the particular limitation involved, and to consider whether the requirement of a belief in a Supreme Being could be validly employed to reject Seeger's claim to an exemption under existing constitutional doctrines.

## IV.

In *Everson* v. *Board of Education*, 330 U.S. 1 (1946), the Supreme Court offered what has perhaps become the most frequently quoted exposition of the significance of the "establishment clause." In the words of the Court, " 'the establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance * * * In the words of Jefferson, the clause against establishment

of religion by law was intended to erect 'a wall of separation between church and state.'"

But, if the Supreme Court has been steadfast in its insistence that government refrain from "aiding" one religion or all religions, *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Engle* v. *Vitale*, 370 U.S. 421 (1962); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), it has been equally vigilant in rejecting any reading of the First Amendment which might dictate a policy of governmental hostility to religion or religious beliefs. *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Everson* v. *Board of Education, supra*. The Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson* v. *Board of Education*, 330 U.S. at 18. Indeed, one member of the Court has recently cautioned against a rigid interpretation of the establishment clause for fear of treading upon the individual citizen's right to the free exercise of his religion, a privilege equally basic to the First Amendment. *School District of Abington Township* v. *Schempp*, 374 U.S. at 247 (concurring opinion of Brennan, J.). And the "free exercise" clause has been intrepreted so as to require government to afford private citizens the utmost freedom to remain true to their religious faith, and to observe the practices sacred to their religion, except when such conduct would impinge upon the equal rights of others, or would interfere with an overriding social objective. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963); cf. *Braunfeld* v. *Brown*, 366 U.S. 599 (1961).

Although stopping short of an argument that the First Amendment compels an exemption for those whose religions prohibit participation in war, the gov-

ernment invokes just such a view of the "free exercise" clause to support the legislative classification challenged in the present case. In essence, the government appears to argue that the spirit of the "free exercise" clause is satisfied when religious objectors are permitted to avoid a course of conduct which their religion condemns. Stated in other words, the government's argument is that Congress was merely seeking to give the greatest possible latitude to the free exercise of religion when it enacted the conscientious objector provisions; since the Constitution does not require that a similar freedom be afforded the exercise of nonreligious beliefs, it is reasonable to distinguish between them.

It is, of course, vital to such a line of reasoning that "religion" and "religious" be properly defined. "A statute could scarcely be defended * * * if it protected the 'free exercise' of only a few favored religions or preferred some religions over others without reasonable basis for doing so." *United States* v. *Jakobson*, 325 F. 2d 409 (2d Cir. 1963). In this regard, the government attempts to justify the "Supreme Being" definition by asserting the propriety of a distinction between beliefs which are solely the result of individual reflection and those which the believer assumes to be the product of divine commands. Congress would be justified, or so it is argued, in refusing to defer to those individuals who merely invoke their own fallible judgment in opposition to that of the legislature; it would be less so with respect to those whose refusal to serve is based upon obedience to a power higher than that exercised by a mortal Congress.

But while we find this argument persuasive, we are unable to consider it dispositive of the case before us. For we feel compelled to recognize that a requirement of belief in a Supreme Being, no matter how broadly

defined, cannot embrace all those faiths which can validly claim to be called "religious." Thus it has been noted that, among other well-established religious sects, Buddhism, Taoism, Ethical Culture and Secular Humanism do not teach a belief in the existence of a Supreme Being. *Torcaso* v. *Watkins,* 367 U.S. 488, 495 n. 11 (1961). Indeed, our country has long prided itself on the enormous diversity of religious beliefs which have been able to find acceptance and toleration on these shores. In this regard, Mr. Justice Brennan has recently explained the development of judicial attitudes towards the First Amendment, by observing that "our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all." *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 240 (1963) (concurring opinion). In the face of this vast conglomeration of differing ideas and ideals, it is not surprising that no single concept may be found which is common to all.

In *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), the Supreme Court struck down as invalid a state statute requiring notaries public to affirm their belief in the existence of God. Although referring to the evils historically attendant upon the requirement of a religious oath for public office, the Court was careful to place its decision on far broader grounds. Government could not, the *Torcaso* court declared, place the power and authority of the state "on the side of one particular sort of believers—those who are willing to say that they believe in 'the existence of God.'" Belief in a Deity was, for the Court, "a belief in some partic-

ular kind of religious concept." And the requirement that candidates for office affirm their devotion to such a concept was, the court held, beyond the constitutional powers of the state.

In a very real sense, the decision in *Kauten* was the precursor of *Torcaso*. For in *Kauten's* broad definition was embraced the recognition that "religion" could not be confined to a belief in a supernatural power; that today, a pervading commitment to a moral ideal is for many the equivalent of what was historically considered the response to divine commands. The *Kauten* test represents an acknowledgment that for many in today's "skeptical generation," just as for Daniel Seeger, the stern and moral voice of conscience occupies that hallowed place in the hearts and minds of men which was traditionally reserved for the commandments of God. It is in this respect that *Kauten* has found its way into the pages of the United States Reports, generally accompanied by a recognition of the impropriety inherent in a governmental determination of what is a "true" or "acceptable" religious belief. See *Saia* v. *New York,* 334 U.S. 558, 564 (1948) (dissenting opinion of Frankfurter, *J.*); *West Virginia State Board of Education* v. *Barnette, supra,* at 659. Cf. *United States* v. *Ballard,* 322 U.S. 78 (1944).

And if a distinction between internally derived and externally compelled beliefs raises serious theoretical problems, the practical difficulties which it engenders are no less perplexing. When Daniel Andrew Seeger insists that he is obeying the dictates of his conscience or the imperatives of an absolute morality, it would seem impossible to say with assurance that he is not bowing to "external commands" in virtually the same sense as is the objector who defers to the will of a supernatural power. Indeed, we would create an

impossible task for draft boards and courts alike were we to insist upon a distinction between Arno Sascha Jakobson's devotion to the mystical force of "Godness" and Daniel Andrew Seeger's compulsion to follow the paths of "goodness."[3]

It is to be emphasized once again that there is no question in this case, as there was in *Jakobson,* as to the sincerity of Seeger's beliefs or the tenacity with which they are held. With commendable candor, the government has fully conceded that Seeger's views fall squarely within the definition of "religion" announced for this Circuit in *Kauten,* and subsequently reaffirmed in *Phillips* and *Reel.* While we are, therefore, most reluctant to find that Congress, in a sincere attempt to balance the personal rights of a minority with the insistent demands of our national security, has transgressed the limits imposed by the Constitution, we are compelled so to hold. This is not to deprecate the enormity of the congressional burden; we fully appreciate the duty and powers of Congress to ensure peace and stability in these unstable times by recruiting citizens for the armed forces. We further recognize the concern for personal liberties and religious freedom which led to the enactment of the conscientious objector exemption in the face of the perils which confront us throughout the world. At

[3] The government has argued that the "Supreme Being" standard may be justified as simplifying the task of the draft boards by providing an objective standard for the determination of sincerity and religious belief. In light of *Jakobson's* expanded definition of "Supreme Being," the test would hardly be free from complexities. In any event, "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 265 (1963) (concurring opinion of Brennan, J.).

the same time, however, we cannot conclude that specific religious concepts, even if shared by the overwhelming majority of the country's organized religions, may be selected so as to discriminate against the holders of equally sincere religious beliefs. Especially when considered in the light of *Torcaso* and the still more recent teachings of the Supreme Court, a line such as is drawn by the "Supreme Being" requirement between different forms of religious expression cannot be permitted to stand consistently with the due process clause of the Fifth Amendment. We are convinced that the believer in a Supreme Being is not for that reason alone more entitled to have his conscience respected by a draft board than is Daniel Seeger. In the words of Madison's historic Remonstrance, recently cited by the Supreme Court in *Engle* v. *Vitale,* 370 U.S. 412, 421 (1962), "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

We wish to make clear, moreover, that by holding the "Supreme Being" requirement to create an impermissible classification under the circumstances present here, we are not passing upon the validity of legislative classifications in terms of religion in any other context.[4] As an observer has recently noted, "to characterize constitutional limitations as inflexible imperatives is an unproductive form of judicial activity." Pollak, Foreword: Public Prayers in Public

[4] It is not inappropriate to note, however, that two courts recently confronted with statutes providing tax exemptions for "religious" organizations interpreted "religion" so as to include groups possessing no theistic beliefs, expressly to avoid constitutional difficulties. *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 2d 673, 315 P. 2d 394 (1957); *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (D.C. Cir. 1957). See also 58 Colum. L. Rev. 417 (1958).

Schools, The Supreme Court—1962 Term, 77 Harv. L. Rev. 62, 67 (1963). We feel it the soundest course to deal with such problems as they are presented to us, and not to lay down hard and fast rules which may be inappropriate to some of the many and varied interactions between government and religion.

In *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952), the Supreme Court acknowledged that "we are a religious people whose institutions presuppose a Supreme Being." Our disposition of this appeal is in keeping with this declaration. It has often been noted that the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage. Indeed, we here respect the right of Daniel Seeger to believe what he will largely *because* of the conviction that every individual is a child of God; and that Man, created in the image of his Maker, is endowed for that reason with human dignity.

Judgment reversed.

# APPENDIX B

UNITED STATES OF AMERICA,

*v.*

DANIEL ANDREW SEEGER, DEFENDANT.

No. 62 Cr. 1003.

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UNITED STATES DISTRICT COURT

S. D. NEW YORK.

APRIL 24, 1963.

LEVET, District Judge.

On November 13, 1962, the defendant was indicted for unlawfully and knowingly failing "to submit to induction at the time and place fixed in an Order to Report for Induction mailed to him by his Selective Service System Local Board." 50 U.S.C. Appendix § 462; 32 C.F.R. § 1632.14.

Defendant pleaded "not guilty" on November 20, 1962. A trial was conducted on March 26, 1963, at which time defendant waived a trial by jury. At the close of the trial decision was reserved.

It is undisputed that defendant's Selective Service File (Exs. 1–60) accurately discloses the following:

Defendant registered with Local Board 66 upon his eighteenth birthday on September 4, 1953. On October 21, 1953 he filed his Classification Questionnaire (S.S.S. Form 100) (Ex. 3). It reflected that he was unmarried and was a chemical engineering student at Cooper Union School of Engineering. He did not execute the claim for conscientious objector exemption

which appears on page 7 of the Questionnaire. He stated that he thought he was entitled to deferment as a student.

The Minutes of Board Action (p. 8 of Questionnaire) reflect that he was initially classified 1–A on October 27, 1953 and that he was reclassified 2–S as a student on July 26, 1955. He remained in that classification until August 26, 1958, when he was reclassified 1–A.

On July 15, 1957 defendant wrote to the Board that he was conscientiously opposed to participation in war. He was mailed a Special Form for Conscientious Objectors (S.S.S. Form 150) (Ex. 11) which he filed with supporting documents on July 29, 1957.

On the Special Form for Conscientious Objectors the defendant executed the Series I claim for exemption for both combatant and noncombatant service which reads:

> "(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and non-combatant training and service in the Armed Forces."

The defendant placed quotation marks around the word "religious" and struck out the word "training and."

In response to the Series II question, "1. Do you believe in a Supreme Being?" the defendant checked neither the "Yes" nor the "No" box but added a third box and the notation: "Please see attached sheet." The Board was also referred to the attached sheet for the answer to the Series II question:

> "2. Describe the nature of your belief which is the basis of your claim made in Series I

> above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation."

In the five-page statement attached to the Special Form the defendant stated in answer to the question as to his belief in a Supreme Being:

> "Of course, the existence of God cannot be proven or disproven, and the essence of his nature cannot be determined. I prefer to admit this and leave the question open rather than answer 'yes' or 'no'. * * *"

His answer to Series II, question 2, describing the views on which his objections to service are based, does not reflect that he believes in a Supreme Being imposing obligations on him superior to those arising from any human relation.

The defendant was continued in classification 2–S until August 26, 1958, when he was reclassified 1–A. On October 17, 1958, defendant was ordered to report for a pre-induction physical on October 29, 1958. On October 20, 1958, the Board received a request for a personal appearance, which was had on October 21, 1958. Following the personal appearance the Board voted to continue the 1–A classification.

The defendant prosecuted an appeal to the Appeal Board. The Appeal Board tentatively determined that he was not entitled to classification 1–O and forwarded the file to the Department of Justice for an advisory opinion.

The Federal Bureau of Investigation conducted a background investigation. Its reports were summarized in a résumé (Ex. 30B) and the files assigned to a Hearing Officer. The defendant was provided with a copy of the résumé prior to the hearing which was held on September 10, 1959. Two witnesses appeared

on defendant's behalf. The hearing officer reported to the Department of Justice that he found the defendant to be sincere in his objection to war and recommended that exemption be granted. The Department of Justice, however, concluded that the defendant's objections were not based upon religious training and belief as required and defined by § 6(j) of the Universal Military Training and Service Act, and recommended to the Appeal Board that the exemption be denied.

The Appeal Board furnished the defendant with a copy of the Department of Justice recommendation and received a reply from him. The Appeal Board classified the defendant 1-A by unanimous vote on May 24, 1960. Upon the defendant's request, the National Director of Selective Service appealed on his behalf to the Presidential Appeal Board. The Presidential Appeal Board classified the defendant 1-A by a unanimous vote on August 25, 1960.

On October 3, 1960, defendant's Local Board mailed him an Order to Report for Induction on October 20, 1960 at the Armed Forces Examination and Induction Station, 39 Whitehall Street, New York, N.Y. On October 20, 1960, the defendant reported as directed and after having been found acceptable for military service refused to submit to induction.

Counsel also stipulated (Ex. 6) that defendant "refused to submit to induction at the time and place aforesaid claiming that the order was invalid as he had wrongfully been denied exemption as a conscientious objector."

Therefore, the sole issue that remains is the validity of the denial of exemption. In this connection, defendant argues that 50 U.S.C. Appendix § 456(j) is unconstitutional.

"There is no direct judicial review of the actions of the Appeal Boards. Questions concerning the classification of the registrant may be raised either in a petition for habeas corpus or as a defense to prosecution for failure to submit to induction into the armed forces." Witmer v. United States, 348 U.S. 375, 377, 75 S. Ct. 392, 393–394, 99 L. Ed. 428 (1954); see also Estep v. United States, 327 U.S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946).

"The range of review is the narrowest known to law." United States v. Corliss, 280 F. 2d 808, 811 (2 Cir., 1960), cert. denied, 364 U.S. 884, 81 S. Ct. 167, 5 L. Ed. 2d 105; Blalock v. United States, 247 F. 2d 615 (4 Cir., 1957); Campbell v. United States, 221 F. 2d 454 (4 Cir., 1955).

As was said in Blalock, supra, 247 F. 2d at page 619:

> "The 'clearly erroneous' rule applied in equity appeals has no place here, nor even the 'substantial evidence' rule of the Administrative Procedure Act, 5 U.S.C.A. § 1009. Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. Witmer v. United States, 348 U.S. 375, 75 S. Ct. 392, 99 L. Ed. 428; Goff v. U.S., 4 Cir., 135 F. 2d 610."

This court has defined its function as follows:

> "The function of the District Court in cases such as these is to examine the entire file or record relating to the registrant's claim for conscientious objector classification to determine if there is any basis in fact to support the Board's determination. 'When the record dis-

closes any evidence of whatever nature which is incompatible with the claim of exemption we may not inquire further as to the correctness of the board's order.' United States v. Simmons, 7 Cir., 1954, 213 F. 2d 901, 904, reversed on other grounds Simmons v. United States, 348 U.S. 397, 75 S. Ct. 397, 99 L. Ed. 453. Courts cannot substitute their judgment on the weight of the evidence for that of the Board. Nor need they look for substantial evidence to support such determination." United States v. Corliss, 173 F. Supp. 677, 680 (S.D.N.Y. 1959), aff'd 280 F. 280 F. 2d 808 (2 Cir., 1960), cert. denied, 364 U.S. 884, 81 S. Ct. 167, 5 L. Ed. 2d 105.

THE REPORTS OF THE FEDERAL BUREAU OF INVESTIGATION AND THE HEARING OFFICER

Defendant contends that he was denied due process because he was not given copies of the above reports. This contention is without merit. The Appeal Board's denial of defendant's claim for exemption was based upon the recommendation of the Department of Justice (Ex. 30A), which, in turn, rested essentially on statement of non-belief filed by the defendant. This being the case, defendant has no right to either set of reports. Gonzalez v. United States, 364 U.S. 59, 63–66, 80 S. Ct. 1554, 4 L. Ed. 2d 1569 (1960). See also United States v. Nugent, 346 U.S. 1, 73 S. Ct. 991, 97 L. Ed. 1417 (1953); United States v. Corliss, 280 F. 2d 808, 810 (2 Cir., 1960), cert. denied 364 U.S. 884, 81 S. Ct. 167, 5 L. Ed. 2d 105 (1960).

CONSTITUTIONALITY OF TITLE 50 U.S.C. APPENDIX § 456(j)

The pertinent provisions of Title 50 U.S.C. Appendix § 456(j) are as follows:

"(j) Nothing contained in this title [sections 451–454 and 455–471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the

> armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *"

Section 5(g) of the Selective Training and Service Act of 1940 (50 U.S.C. Appendix § 305(g)) provided as follows:

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

In amending the 1940 Act and in enacting Section 6(j) of the 1948 Act (which is identical with § 6(j) of the 1951 Act here under discussion), Congress added the following language to the quotation above from the 1940 Act:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Defendant's contentions as to the unconstitutionality of the above-mentioned clause are as follows:

1. Congress by passage of the 1948 amendment restricted a prior definition and the concept of "Religious training and belief" so as to relate it only to a belief "in a relation to a Supreme Being."

2. Congress thus created a preference and an aid in favor of conscientious objectors *who have a belief in a Supreme Being* against those whose objection is related to or based upon some other type of religious training and belief or on a non-religious training and belief.

3. Congress has thus, in effect, established as an official religion a religion that is related to a belief in a Supreme Being and has placed the support of the government behind this particular religious belief, thus violating the Establishment Clause of the First Amendment, the Due Process Clause of the Fifth Amendment, and the religious test clause of Article VI, Clause 3 of the Constitution providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

The First Amendment to the United States Constitution, in the applicable portion, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fifth Amendment provides that Congress may not deprive a person of life, liberty or property without due process of law.

There was proof by stipulation that the grounds on which defendant claimed exemption are religious and arise from religious training and belief by reason of which defendant is conscientiously opposed to participation in war fall within the definitions of religion as set forth in the following cases, determined by the Second Circuit Court of Appeals: United States v. Kauten, 133 F. 2d 703 (1943); United States ex rel. Phillips v. Downer, 135 F. 2d 521 (1943); United States ex rel. Reel v. Badt, 141 F. 2d 845 (1944), cert. dismissed 328 U.S. 817, 66 S. Ct. 979, 90 L. Ed. 1599. (See minutes 35, 36)

In substance, those cases decided under the 1940 Act held that a sincere, absolute abhorrence of all war as ethically wrong, proceeded from a "religious impulse" and met the test of the statute, which, in the same language as the 1948 and 1951 Acts, exempted one who "by reason of religious training and belief is * * * opposed to participation in war in any form" without further elaboration. A diametrically contrary conclusion was reached by the Ninth Circuit Court of Appeals in Berman v. United States, 156 F. 2d 377 (9 Cir., 1946), cert. denied, 329 U.S. 795, 67 S. Ct. 480, 91 L. Ed. 680. It was there held that Congress intended to exempt only those who based their objections on belief in a deity commanding abstinence from war on pain of supernatural sanction.

In enacting Section 6(j) of the 1948 Act (which is identical with Section 6(j) of the 1951 Act here under discussion), Congress explicitly adopted the view of the Berman case and added the limiting definition:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

See Selective Service Act of 1948 Senate Committee Report, United States Code Congressional Service, 80th Congress, 1948, 2d Session, P. 1989 at p. 2002.

However, a defendant's inability to assert a belief in a Supreme Being as a basis for the claim of exemption has been sustained as sufficient for a denial of a claim for exemption. United States v. Bendik, 220 F. 2d 249 (2 Cir., 1955); United States v. DeLime, 223 F. 2d 96 (3 Cir., 1955); Davidson v. United States, 225 F. 2d 836 (9 Cir., 1955); Clark v. United States,

236 F. 2d 13 (9 Cir., 1956), cert. denied, 352 U.S. 882, 77 S. Ct. 101, 1 L. Ed. 2d. 80.

In the Bendik case, supra, Judge Smith, speaking for the Second Circuit, wrote:

> "* * * the sincerity of his conscientious scruples against service was immaterial, since admittedly they were not founded on belief in a Supreme Being, a requirement as a ground for deferment under the Act. 50 U.S.C.A. Appendix, § 456(j). Berman v. United States, 9 Cir., 156 F. 2d 377, certiorari denied 329 U.S. 795, 67 S. Ct. 480, 91 L. Ed. 680. * * *" (220 F. 2d p. 252)

In Clark, supra, the defendant raised the same constitutional questions relied upon by defendant here but the Ninth Circuit upheld denial of exemption. Certiorari was denied. See also George v. United States, 196 F. 2d 445 (9 Cir., 1952), cert. denied, 344 U.S. 843, 73 S. Ct. 58, 97 L. Ed. 656.

There is no violation of the religious test provision of Article VI, Clause 3. Exemption from military service can hardly be deemed an "Office or public Trust under the United States." Such a view is indeed specious. Clark v. United States, 236 F. 2d 13, 23 (9 Cir., 1956), cert. denied, 352 U.S. 882, 77 S. Ct. 101, 1 L. Ed. 2d 80. Cf. Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961).

Likewise, Congress has not established a church or coerced religious belief, in violation of Amendment I. (Arver v. United States (Selective Draft Law Cases), 245 U.S. 366, 38 S. Ct. 159, 62 L. Ed. 349 (1918)). Congress has not set up a state church, nor aided any religion, nor compelled attendance or non-attendance at any church. Neither has it compelled profession or refraining from profession of any belief or disbelief, nor imposed punishment for any conduct.

No financial support of government has been devoted to any particular religious belief (cf. Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)) nor has any compulsive religious service been supported (cf. Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962)).

Congress, by Article 1, Section 8, is given power to raise and support armies and to provide and maintain a navy. Therefore, "Congress has power to raise armies, to determine who shall serve in such armies, and who shall be exempt, in time of peace and in time of war. Such powers are essential to national security. See United States v. Macintosh, 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302; United States v. Henderson, 7 Cir., 1950, 180 F. 2d 711, certiorari denied, 1950, 339 U.S. 963, 70 S. Ct. 997, 94 L. Ed., 1372; Richter v. United States, 9 Cir., 1950, 181 F. 2d 591, certiorari denied, 1950, 340 U.S. 892, 71 S. Ct. 199, 95 L. Ed. 647; Warren v. United States, 10 Cir., 1949, 177 F. 2d 596, certiorari denied, 1950, 338 U.S. 947, 70 S. Ct. 485, 94 L. Ed. 584. * * *" United States v. Bartell, 144 F. Supp. 793, 796 (S.D.N.Y. 1956). The question of exemption from military service is a part of the procedure of raising an army, which is vested in Congress and its instrumentalities. United States ex rel. Goodman v. Hearn, 153 F. 2d 186, 188 (5 Cir., 1946), cert. dismissed, 329 U.S. 667, 67 S. Ct. 24, 91 L. Ed. 589. The war power tolerates no limitations except those found in the Constitution or in applicable principles of international law. United States v. Mackintosh, 283 U.S. 605, 622, 51 S. Ct. 570, 75 L. Ed. 1302, overruled on other grounds, Girouard v. United States, 328 U.S. 61, 66 S. Ct. 826, 90 L. Ed. 1084 (1946).

Defendant relies upon certain decisions of the United States Supreme Court postdating draft exemption determinations, to wit, Torcaso v. Watkins,

367 U.S. 488, 495, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961); Engel v. Vitale, 370 U.S. 421, 430, 431, 432, 82 S.Ct. 1261, 8 L. Ed 2d 601 (1962); McGowan v. Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); Everson v. Board of Education, 330 U.S. 1, 15, 16, 67 S. Ct. 504, 91 L. Ed. 711 (1947); People of State of Ill., ex rel. McCollum v. Board of Education, 333 U.S. 203, 210, 211, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

There is nothing in these decisions to justify the position defendant takes. Torcaso, supra, 367 U.S. at 493, 81 S. Ct. at 1682–1683, 6 L. Ed. 2d 982 quotes from Everson, supra: "Neither [i.e., state or nation] can pass laws which aid one religion, aid all religions, or prefer one religion over another." I do not interpret this statement to make it improper for Congress to exempt from military service certain individuals who are defined in the statute in question. Such a policy does not aid one religion or all religions or prefer one religion over another. It merely classifies those who, under certain conditions there specified, may secure exemption from military service. Certain individuals are affected but not religious organizations. Everson, supra, like McCollum, supra, involved questions of the power of a state to utilize its tax-supported public school system in aid of religious instruction. Neither does it appear that defendant can draw any aid or comfort from McGowan v. Maryland, supra, which related to Sunday Closing Laws, or from Engle v. Vitale, supra, the public school prayer case.

Other cases such as Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); Washington Ethical Society v. District of Columbia, 101 U.S. App. D.C. 371, 249 F. 2d 127 (1957); and Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P. 2d 394, have no bearing, as I see it, upon the claim of defendant.

Since the Congress has the right to determine who shall serve and who shall be exempt, it has the power to define the categories of those who may be thus exempted. Rase v. United States, 129 F. 2d 204 (6 Cir., 1942); United States v. Bartell, 144 F. Supp. 793, 796 (S.D.N.Y. 1956); see also Korte v. United States, 260 F. 2d 633 (9 Cir., 1958), cert. denied, 358 U.S. 928, 79 S. Ct. 313, 3 L. Ed. 2d 301. Therefore, exemption from military service is a matter of legislative grace and not a matter of right. Korte v. United States, supra, 260 F. 2d at 635.

In short, defendant's attack on the clause here involved is not new. Congress is bound to raise armies. No invidious discrimination exists. It is within the power of Congress to enable reasonable classifications to achieve the ends sought. No religion is thereby established. No freedom of worship is invaded. No compulsive acts are required. All persons of the class of defendant receive equal treatment. Congress, which has a right to refuse all exemptions, has a clear right to limit such exemptions. The statute determines those who may come within the terms of the exemptive grace, the policy which the legislative branch is empowered to select. The section involved is constitutional and there was a "basis in fact" for the Appeal Board's denial of exemption.

The defendant is, therefore, held guilty. Sentence is set for Wednesday, May 15, 1963, at 10:00 A.M. in Room 705. The customary pre-sentence report is to be prepared.

# APPENDIX C

## UNITED STATES COURT OF APPEALS

## FOR THE

## SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of January one thousand nine hundred and sixty-four.

Present:

Hon. J. EDWARD LUMBARD,
*Chief Judge,*
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
*Circuit Judges.*

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UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

DANIEL ANDREW SEEGER, DEFENDANT-APPELLANT.

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

A. DANIEL FUSARO, *Clerk.*



U.S. GOVERNMENT PRINTING OFFICE: 1964